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ENHANCING DIVERSITY IN AN APPOINTIVE SYSTEM OF SELECTING JUDGES

Cover Page Footnote

Regents' Professor of Law, University of New Mexico School of Law ("UNM"). As dean of the UNM School of Law from 1991 to 1997, the author served as chair of all judicial nominating commissions in the state of New Mexico. The New Mexico Constitution names the dean of the Law School as the chair of the commissions, including the appellate nominating commission for the supreme court and the court of appeals, as well as every district court in the state. See N.M. CONST. art. VI, § 35. The author wishes to express his appreciation for the research assistance provided by Barbara Lah, Research Librarian at the UNM School of Law, and Vanessa Chavez, research assistant for Barbara Lah.

ENHANCING DIVERSITY IN AN APPOINTIVE SYSTEM OF SELECTING JUDGES

*Leo M. Romero**

I. INTRODUCTION

Any system for selecting judges must be legitimate, and it will not be perceived as legitimate if it excludes certain members of the bar or if it makes it difficult for different groups to get its members on the bench. For an appointive system¹ to be perceived as legitimate, it must ensure that diversity is considered in nominating candidates and in appointing judges. This Article will examine the different measures that states, with a particular focus on New Mexico, have adopted in order to enhance diversity in their appointive systems and then propose ways to structure an appointive system that gives due consideration to concerns about diversity. This Article concludes that an appointive system should be designed to require consideration of diversity in the composition of nominating commissions and in the evaluation of applicants. In addition, an appointive system should include provisions that make the process transparent, so that it can be monitored to see if the process is fair in providing lawyers from all minorities and genders a fair chance of becoming a judge. Finally, the system must provide for account-

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1. Although the appointive systems in effect in the states vary in their details, the general features of an appointive system for selecting judges include an evaluation of judicial applicants by a nominating commission, recommendation or nomination of a list of applicants to the governor, and appointment by the governor limited to nominees on the recommended list. Appointive systems have been established by the voters in constitutional amendments, by legislative enactment, and by executive order. For an example of an appointive system authorized by a constitution, see ARIZ. CONST. art. V, § 36. For an example of an appointive system established by statute, see CONN. GEN. STAT. § 51-44a (2006). For an example of an appointive system created by executive order of the governor, see Mass. Exec. Order No. 470, 1046 Mass. Reg. 3 (Feb. 3, 2006).

ability by providing means to ensure compliance with the diversity and transparency requirements.

II. DESIGNING AN APPOINTIVE SYSTEM TO ENHANCE DIVERSITY

Appointive systems for selecting judges necessarily must be attentive to the issue of diversity if they are to be perceived as fair. The screening of judicial applicants by a nominating committee involves selection by a small group with little accountability, unlike an electoral system for selecting judges where judicial candidates subject themselves to the voters in a public election. Although the ultimate appointment is made by the governor, an official accountable to the public, the governor's appointment power is limited to the list of applicants nominated by the commission. Nominating commissions, therefore, have considerable control over the selection of judges by reason of their power to decide which candidates can be considered for appointment by the governor. Thus, the possibility exists for an appointive system to be perceived as controlled by a group of insiders without accountability and to be perceived as a system that works to the disadvantage of outsiders like women and minority lawyers, lawyers in small firms or sole practice, and lawyers who practice outside of the urban centers of the state. Appointive systems must be designed to counter these possible perceptions and to ensure that the process is inclusive, open, and fair. The legitimacy and credibility of the appointive system therefore depend on the public's faith in the fairness of the system and in the acceptance of the system by all communities, including minority communities.

To achieve diversity in an appointive system, the people involved in implementing the process must be directed to consider diversity at the different stages of the process. Diversity should be considered in appointing nominating commissions, in evaluating and recommending judicial applicants, and in appointing judges. Although consideration of diversity does not necessarily produce a diverse judiciary, and indeed does not require that women and minority lawyers be appointed to the bench, the consideration of diversity focuses attention on the need to have a judiciary that will serve diverse communities and should result in a selection system that is fair and inclusive.

Consideration of diversity in the appointive system process can be required in several ways. First, the law establishing the appointive system can require the consideration of diversity in commis-

sion composition and in the evaluation of applicants. Second, nominating commissions can create their own rules that require consideration of diversity. Third, nominating commissions or the chair can adopt informal practices that promote diversity.

III. DIVERSITY CONSIDERATIONS REQUIRED BY LAW

Ensuring diversity is most likely to occur when the law establishing the appointive system, whether in a constitution or statute, includes language that mandates consideration of diversity. Mandates can also be accomplished by executive order. Diversity language in constitutional provisions, legislation, or executive orders has the effect of valuing diversity and giving it the legal stamp of approval. Legally requiring diversity considerations should influence the behavior of those charged with implementing an appointive system. Diversity provisions can apply to several stages in the appointive system and can require the consideration of diversity in (1) the composition of the nominating commissions, (2) the evaluation of candidates by the commissions, and (3) the appointment of nominees by the governor.

A. Diversity in Nominating Commissions

A review of the appointive systems in effect in 2006 shows that twelve states include diversity provisions with regard to the composition of commissions. Most of these provisions appear in statutes,² but some appear in constitutions³ and three appear in executive orders.⁴ The language requiring consideration of diversity varies, with some states specifically requiring consideration of race and gender,⁵ and others requiring consideration more generally of the broad diversity of the citizenry of the state.⁶ One state requires

2. See, e.g., CAL. GOV'T CODE § 12011.5(b) (2006); FLA. STAT. § 43.291(4) (2006); MINN. STAT. § 480B.01(2)(e) (2005); R.I. GEN. LAWS § 8-16.1-2(a)(3) (2006); TENN. CODE ANN. § 17-4-102 (b)(3) (2006).

3. See, e.g., ARIZ. CONST. art. VI, § 36A; N.M. CONST. art. VI, § 35.

4. See, e.g., Del. Exec. Order No. 4, 4 Del. Reg. Regs. 1310 (Feb. 21, 2001); Ga. Exec. Order No. 06.11.03.01, 26 Ga. Gov't Reg. 10 (Weil June 2003); Md. Exec. Order No. 01.01.2003.12(B)(1)(e), 30:9 Md. Reg. 593 (Apr. 7, 2003); Mass. Exec. Order No. 470, § 1.1, 1046 Mass. Reg. 3 (Feb. 3, 2006).

5. See, e.g., CAL. GOV. CODE § 12011.5(b) (2006); FLA. STAT. § 43.291(4) (2005); MINN. STAT. § 480B.01(2)(e) (2005); R.I. GEN. LAWS § 8-16.1-2(a)(3) (2006); TENN. CODE ANN. § 17-4-102(b)(3) (2005); Md. Exec. Order 01.01.2003.12, 30:9 Md. Reg. 593; Mass. Exec. Order No. 470, § 1.1, 1046 Mass. Reg. 3 (Feb. 3, 2006).

6. See, e.g., Del. Exec. Order No. 4, 4 Del. Reg. Regs. 1310 (Feb. 21, 2001); Ga. Exec. Order No. 06.11.03.01, 26 Ga. Gov't Reg. 10 (Weil June 2003).

gender balance but does not require any other types of diversity,⁷ and two states do not define diversity.⁸ A number of states also require that nominating commissions reflect geographic diversity,⁹ law practice diversity,¹⁰ and political balance.¹¹

The New Mexico judicial selection system¹² provides an example of a constitutional requirement of diversity in the composition of nominating commissions. In the provision setting forth how the commission members will be selected, the New Mexico Constitution states that the president of the state bar, in consultation with the judges on the commission, shall appoint additional members of the bar to achieve political balance on the commission and to insure that “the diverse interests of the state bar are represented.”¹³

7. See, e.g., Amer. Jud. Soc’y, Judicial Selection in the States - Iowa, http://www.ajs.org/js/IA_methods.htm (last visited Jan. 20, 2007).

8. See, e.g., ARIZ. CONST. art. VI, § 36A (“reflecting the diversity of the population of the state”); N.M. CONST. art. VI, § 35 (mandating that “diverse interests [of the state bar] are represented”).

9. See, e.g., ALASKA CONST. art. IV, § 8 (area representation); IOWA CONST., art. V, § 16 (area representation); FLA. STAT. § 43.291(4) (2005) (geographic distribution); Mass. Exec. Order 470, § 1.1, 1046 Mass. Reg. 3 (Feb. 3, 2006) (geography).

10. See, e.g., N.M. CONST. art. VI, § 35 (“representing civil and criminal prosecution and defense”); Mass. Exec. Order No. 470, § 1.1, 1046 Mass. Reg. 3 (Feb. 3, 2006) (“various practice areas and size of practice”).

11. See, e.g., COLO. CONST. art. VI, § 24(2) (“no more than one-half of the commission members, plus one . . . shall be members of the same political party”); NEB. CONST. art. V, § 21 (4) (2005) (“not more than four of the nine members shall be of the same political party”); N.M. CONST. art. VI, § 35 (“the two largest major political parties [shall] be equally represented on the commission”); CONN. GEN. STAT. § 51-44(a)(2) (2006) (“not more than six of the [twelve] members shall belong to the same political party”); STATE OF UTAH JUDICIAL COUNCIL, MANUAL OF PROCEDURES FOR JUDICIAL NOMINATING COMM’NS, § V (April 24, 2000) [hereinafter UTAH JUDICIAL NOMINATING COMM’NS MANUAL] (“not more than four members [of the eight members] of each commission may be of the same political party). *Contra* ALASKA CONST. art. IV, § 8 (forbidding consideration of political balance).

12. For a fuller description of the New Mexico system for selecting judges, see Leo M. Romero, *Judicial Selection in New Mexico: A Hybrid of Commission Nomination and Partisan Election*, 30 N.M. L. REV. 177 (2000).

13. N.M. CONST. art. VI, § 35. The New Mexico Appellate Nominating Commission includes at least three judges, at least one non-lawyer, and at least five lawyers. The judges include the chief justice of the supreme court, or his designee, and two judges of the court of appeals appointed by the chief judge of the court of appeals. In addition to the judges, the state’s leading political officials appoint six members to the commission. The governor, president *pro tempore* of the senate, and the speaker of the house of representatives each appoint two commissioners—one lawyer and one non-lawyer. To complete the commission membership, the president of the state bar of New Mexico, in consultation with the judges on the commission, appoints at least four members of the state bar, representing civil and criminal prosecution and defense. The president of the state bar and the judges may appoint additional members of the bar in order to achieve political parity and to insure that the diverse interests of the state bar are represented. See N.M. CONST. art. VI, § 35.

The constitution does not impose a diversity requirement on any of the other officials who appoint members of the commission (the governor, the speaker of the house of representatives, and the president *pro tempore* of the senate). The constitution also provides that the dean of the University of New Mexico School of Law “shall be the final arbiter of whether such diverse interests are represented.”¹⁴ The phrase “diverse interests” is not defined in the constitution and the dean, as the arbiter of diversity, is left to define the term. According to deans who have served as chair of the nominating commission, diversity includes geography, practice type (for example, civil, criminal, plaintiff, or defense), gender, race, and ethnicity.¹⁵ To determine whether diverse interests of the bar are represented on nominating commissions, the dean does two things. First, the dean consults with the president of the state bar to ensure that women and minority lawyers are represented on the commissions. Second, whenever a vacancy occurs, the dean notifies the governor, speaker of the house of representatives, and president *pro tempore* of the senate of the need to appoint commissioners¹⁶ and specifically reminds them to consider appointing women and minorities.

A provision that goes beyond mandating consideration of diversity by requiring a certain percentage or number of women or minority commissioners may result in equal protection challenges. Indeed, Florida’s attempt to reserve one-third of commission seats for women or members of a racial or ethnic minority group faced such a challenge. A federal court invalidated the Florida law on grounds that the 1991 statute violated the equal protection clause of the Fourteenth Amendment.¹⁷ Florida law now requires that the governor, who makes the appointments to the nominating commissions, ensure that to the extent possible, the membership of

14. *Id.* The New Mexico Constitution does not say what the dean should do, or even what the dean can do, with regard to determining whether diverse interests of the state bar are represented.

15. This observation is based on the author’s conversations with the fellow deans who have served as chairs of the nominating commissions since its inception in 1989, Theodore Parnall, Robert J. Desiderio, and Suellyn Scarnecchia (current dean and chair).

16. Although the Constitution provides that the terms of nominating commissioners shall be set by law, N.M. CONST. art. VI, § 35, the New Mexico legislature has not enacted legislation fixing the terms of commissioners. As a result, whenever a judicial vacancy occurs, the dean asks the appointing authorities whether they intend to retain their commissioners or to replace them. Amer. Jud. Soc’y, Judicial Selection in the States – New Mexico, http://www.ajs.org/js/NM_methods.htm (last visited Jan. 20, 2007).

17. *Mallory v. Harkness*, 895 F. Supp. 1556 (S.D. Fla. 1995).

each commission reflects the “racial, ethnic, and gender diversity, as well as the geographic distribution of the population” within the relevant jurisdiction.¹⁸

B. Consideration of Diversity in Evaluations of Judicial Applicants

Unlike mandates to consider diversity in nominating commissions, states for the most part do not require commissions to consider diversity when evaluating candidates and deciding whom to recommend to the governor for appointment. States generally require only that candidates be evaluated on the basis of criteria that do not include race, ethnicity, or gender.¹⁹ Only three states refer to gender or minority status of the candidates when addressing the evaluation of candidates.²⁰ By statute, Minnesota requires that commissions evaluate the extent to which candidates meet the criteria for judicial office and specifically provides that “the commission shall give consideration to women and minorities.”²¹ In addition, this statutory provision requires commissions to “solicit, in writing, recommendations from . . . organizations that represent minority or women attorneys in the judicial district who have requested solicitation.”²² Alaska and Utah require the same consideration of gender and minority status at the evaluation stage, but

18. FLA. STAT. § 43.291(4) (2005).

19. For example, the evaluative criteria of Colorado, Connecticut, and Delaware does not include consideration of gender or race as a criterion. *See* CONN. GEN. STAT. § 51-44a(e) (2004) (listing the following criteria: legal ability, competence, integrity, character, and temperament); CONN. JUDICIAL SELECTION REPORT, ch. 3, figures III-1 and III-2 (2000), *available at* <http://www.cga.ct.gov/pri/archives/2000jsreportchap3.htm> (giving more detailed evaluation criteria); Del. Exec. Order No. 4, 4 Del. Reg. Regs. 1311 (Feb. 21, 2001) (listing the following criteria: intellect, work ethic, temperament, integrity and ability to sensibly, intelligibly, promptly, impartially, and independently interpret the law and administer justice); RULES OF PROCEDURE FOR THE COLO. SUPREME COURT NOMINATING COMM’N, Rule II G, (Adopted Aug. 29, 1979, amended Dec. 2, 2005), *available at* <http://www.courts.state.co.us/supct/committees/nomcommdocs/rules/srules.htm> [hereinafter COLORADO NOMINATING COMM’N RULES] (listing the following criteria: integrity and moral courage, legal ability and experience, intelligence, and wisdom, deliberate and fair minded, industrious and prompt, acceptable personal habits and outside activities, and courteous and considerate).

20. *See, e.g.*, MINN. STAT. § 480B.01(8) (2005); ALASKA JUDICIAL COUNCIL PROCEDURES FOR NOMINATING JUDICIAL CANDIDATES § VI A, *available at* <http://www.ajc.state.ak.us/selection/procedur.htm> [hereinafter ALASKA JUDICIAL NOMINATING PROCEDURES]; UTAH JUDICIAL NOMINATING COMM’NS MANUAL, *supra* note 11, § IX(B).

21. MINN. STAT. § 480B.01(8) (2005).

22. *Id.*

do so by rule rather than statute.²³ The Alaska Procedures for Nominating Judicial Candidates include legal and life experience as criteria for evaluating the qualifications of candidates and inform candidates that the Judicial Council, as the nominating body in Alaska, will look for broader qualities reflected in the applicant's life experiences "such as the diversity of the applicant's personal and educational history, exposure to persons of different ethnic and cultural backgrounds, and demonstrated interests in areas outside the legal field."²⁴ In the Utah Manual of Procedures for Judicial Nominating Commissions, commissions are warned that evaluation criteria contain some bias that may operate to the disadvantage of women and minorities and are advised to determine how to weigh the various criteria.²⁵ Moreover, the Manual specifically allows consideration of diversity. In a section entitled Diversity on the Bench, the Manual provides:

When deciding among applicants whose qualifications appear in all other respects to be equal, it is relevant to consider the background and experience of the applicants in relation to the current composition of the bench for which the appointment is being made. The idea is to promote a judiciary of sufficient diversity that it can most effectively serve the needs of the community.²⁶

C. Consideration of Diversity in the Appointment of Recommended Candidates

Only one state, Arizona, requires the governor to consider diversity when appointing a judge. The Arizona constitution requires the governor to fill a judicial vacancy by appointing one of the nominees submitted to him by a judicial appointment commission. It specifically provides: "In making the appointment, the governor shall consider the diversity of the state's population for an appellate court appointment and the diversity of the county's population

23. See, e.g., ALASKA JUDICIAL NOMINATING PROCEDURES, *supra* note 20; UTAH JUDICIAL NOMINATING COMM'NS MANUAL, *supra* note 11, § IX B(2).

24. ALASKA JUDICIAL NOMINATING PROCEDURES, *supra* note 20, § VI(A).

25. UTAH JUDICIAL NOMINATING COMM'NS MANUAL, *supra* note 11, § IX(B). This provision gives the following example: "A criterion that emphasizes a history of professional advancement may overlook qualified women and minorities who face greater obstacles to advancement." *Id.*

26. *Id.* § IX(B)(2).

for a trial court appointment, however the primary consideration shall be merit.”²⁷

IV. DIVERSITY CONSIDERATIONS REQUIRED BY RULE

A second way to ensure diversity, apart from constitutional and legislative mandates or executive orders, would be to adopt rules of procedure that enhance the selection of women and minorities to the nominating commissions and increase the number of applicants from minority groups and women. In some states, the judicial nominating commission has adopted rules of procedure governing the appointive process,²⁸ and in other states the supreme court of the state has adopted rules for the commissions.²⁹ Of the states that have adopted rules governing the appointive judicial selection process,³⁰ only a few have included diversity provisions.³¹ Alaska's rules, for example, define the criterion of legal and life experiences to include “the diversity of the applicant's personal and educational history [and] exposure to persons of different ethnic and cultural backgrounds.”³² Utah's rules, likewise, address diversity and declare that diversity on the bench is a relevant consideration in evaluating judicial applicants.³³

Addressing diversity by rule has the advantage of institutionalizing effective procedures that will survive changes in the commission members, governor, and those responsible for appointing the

27. ARIZ. CONST. art. VI, § 37C (2006). Another provision of the Arizona Constitution provides that “The makeup of the committee shall, to the extent feasible, reflect the diversity of the population of the state.” *Id.* § 36A.

28. *See, e.g.*, ALASKA JUDICIAL NOMINATING PROCEDURES, *supra* note 20; RULES GOVERNING JUDICIAL NOMINATING COMM'NS OF THE STATE OF NEW MEXICO, *published as appendix to* N.M. CONST. art. VI [hereinafter N.M. RULES GOVERNING JUDICIAL SELECTION COMM'NS].

29. *See, e.g.*, NEB. REV. STAT. ANN. § 24-812.01 (LexisNexis 2006) (In Nebraska, the legislature required the state supreme court to promulgate the procedures of the nominating commissions); COLO. NOMINATING COMM'N RULES, *supra* note 19 (Colorado Supreme Court promulgates rules).

30. *See, e.g.*, ALASKA JUDICIAL NOMINATING PROCEDURES, *supra* note 20, § VI(A); COLO. NOMINATING COMM'N RULES, *supra* note 19; STATE OF HAW. JUDICIAL SELECTION COMM'N RULES (adopted by the Commission Apr. 23, 1979 with amendments as noted pursuant to art. VI, § 4 of the Hawai'i State Constitution), *available at* <http://state.hi.us/jud/ctrules/jsr.htm>; N.M. RULES GOVERNING JUDICIAL SELECTION COMM'NS, *supra* note 28; UTAH JUDICIAL NOMINATING COMM'NS MANUAL, *supra* note 11, § IX(B); S.D. RULES OF PROCEDURE OF THE JUDICIAL QUALIFICATION COMM'N, 1997 S.D. Sess. Laws 326.

31. *See, e.g.*, ALASKA JUDICIAL NOMINATING PROCEDURES, *supra* note 20, § VI(A); UTAH JUDICIAL NOMINATING COMM'NS MANUAL, *supra* note 11, § IX(B).

32. ALASKA JUDICIAL NOMINATING PROCEDURES, *supra* note 20, § VI(A).

33. *See supra* notes 23 and 25 and accompanying text.

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commission members. Those implementing the appointive system will change, but adopted procedures should endure such changes. Although rules may not have the same standing as legislation or constitutional provisions, they do have many of the advantages of law. Rules are generally published and accessible to the public and applicants. Failure to follow them may lead to lawsuits demanding commission compliance with the rules. Minority applicants or minority bar associations may monitor compliance with published rules and complain publicly if commission rules are not followed or even violated. The possibility of enforcement of the rules by courts or of airing complaints in the public arena provides ample incentives for those implementing the appointive system to comply with the adopted rules.

Other ways have been suggested to ensure that commissions and their members comply with commission rules. An appointive system could designate by statute or rule an official to monitor compliance with diversity requirements: for example, New Mexico designates the dean of the law school, who serves as chair of the nominating commission, as the final arbiter of whether the varied interests of the state bar are represented on the commission.³⁴ Others who have studied appointive systems have proposed oversight of commissions by a review commission or an ombudsman.³⁵

Accountability must be built into an appointive system if it is to be legitimate and accepted. There must be some means by which interested parties can challenge the decisions of the people and institutions implementing the process and have those decisions reviewed. Whether the review is by a dean, ombudsman, review commission, or by a court, the means of review should be part of the system.

Rules and procedures that enhance diversity fall into three categories. They range from rules requiring the consideration of diversity to procedures that involve outreach to women's and minority bar associations. Procedures that promote transparency in the appointive process are particularly important since they enhance the participation of women and minority lawyers in the process.

34. See N.M. CONST. art. VI, § 35.

35. See Norman L. Greene, *Perspectives on Judicial Selection Reform: The Need to Develop a Model Appointive Selection Plan for Judges in Light of Experience*, 68 ALB. L. REV. 597, 604 (2005).

A. Rules Requiring Consideration of Diversity

Diversity in Commissions: As described earlier, twelve states require consideration of diversity in the appointment of commission members.³⁶ If consideration of diversity is not mandated by law, rules can be promulgated that require the authorities that appoint commission members to consider gender, race, or ethnic diversity in making their appointments. Although a rule framed in such a way does not require appointment of a woman or minority to a nominating commission, the rule at least has the value of focusing the appointing authority on the issue of diversity.

Consideration of Diversity in Evaluation of Candidates: As noted earlier, three states presently require nominating commissions to consider gender, race, and ethnic status as part of the evaluation of judicial candidates.³⁷ One state imposes this consideration by statute,³⁸ and the other two states adopted rules requiring consideration of diversity in the candidate evaluation.³⁹ Although not requiring the inclusion of women or minorities on the list of nominees, the rule has process value by focusing attention on diversity.

B. Rules Requiring Outreach to Minority and Women

Rule Requiring Recruitment of Women and Minority Lawyers to Serve on Nominating Commissions: Notice of vacancies on nominating commissions should be given to women's and minority bar associations. These organizations can then solicit their members to serve on a commission and also lobby the appointing authorities to appoint one of their members to the commission.

Rule Requiring Recruitment of Women and Minority Lawyers to Apply for Judicial Positions: In addition to general notices of judicial vacancies, special notices should be sent to women's and minority bar associations to communicate that the appointive system welcomes their participation and candidacies. For example, Massachusetts requires by executive order that all advertisements of judicial vacancies shall include a statement that "the Commission encourages applications by qualified persons of diverse gender, race, ethnicity and experience."⁴⁰

36. See *supra* notes 2-11 and accompanying text.

37. See *supra* notes 19-23 and accompanying text.

38. MINN. STAT. § 480B.01(8) (2005).

39. ALASKA JUDICIAL NOMINATING PROCEDURES, *supra* note 20, § VI(A); UTAH JUDICIAL NOMINATING COMM'NS MANUAL, *supra* note 11, § IX(B).

40. Mass. Exec. Order No. 470, § 3.3, 1046 Mass. Reg. 3 (Feb. 3, 2006).

Rule Requiring Presentations Regarding the Appointive Process at Women's and Minority Bar Association Meetings: The chair of the nominating commission or someone involved in the appointive process should go to meetings of women's and minority bar associations, both state and local associations, to describe and explain how the appointive system operates and to answer questions about the process. These presentations should cover the application questionnaire, the interview process, evaluation criteria, and confidentiality rules. The presenters should encourage these associations to get involved in the process and to solicit their members to get on commissions and to apply for judicial vacancies.

C. Rules Requiring Transparency

A number of states have promulgated rules that make the appointive process open and transparent. The degree to which commission actions, information, and meetings are open to the public varies. Some states require commission interviews of candidates to be open⁴¹ while some permit the interviews to be closed to the public.⁴² The rules in some states allow the public access to the applicant's questionnaire, with the exception of sensitive and highly personal information like medical and health history,⁴³ while others provide that information submitted by applicants will be confidential.⁴⁴ Many states permit the commission's deliberations to be conducted in closed session to promote candid discussion of the candidates.⁴⁵ One state, however, has adopted confidentiality rules that prevent disclosure of the actions of the commission and keep important information from the public. Colorado provides that the official actions of the commission, the names of those considered for each vacancy, and the names of nominees shall be confidential.⁴⁶

41. See, e.g., N.M. RULES GOVERNING JUDICIAL SELECTION COMM'NS, *supra* note 28, § 5(B).

42. See, e.g., ALASKA JUDICIAL NOMINATING PROCEDURES, *supra* note 20, § V(A)(2).

43. See, e.g., ALASKA JUDICIAL NOMINATING PROCEDURES, *supra* note 20, § I(C); N.M. RULES GOVERNING JUDICIAL SELECTION COMM'NS, *supra* note 28, § 2(D).

44. See, e.g., UTAH JUDICIAL NOMINATING COMM'NS MANUAL, *supra* note 11, § 7(C).

45. See, e.g., N.M. RULES GOVERNING JUDICIAL SELECTION COMM'NS, *supra* note 28, § 7(A); ALASKA PROCEDURES FOR NOMINATING JUDICIAL CANDIDATES, *supra* note 20, §§ VI(B), (C).

46. COLO. NOMINATING COMM'N RULES, *supra* note 19, §§ II(F), (H).

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Rules that promote transparency and, therefore, support diversity in the appointive system of selecting judges, are proposed below.

Rule Permitting Public Access to Commission Documents and Data: The names of commission members, applicants for judicial vacancies, and those nominated to the governor should be public information.⁴⁷ In addition, the applicant questionnaires should generally be available for public inspection.⁴⁸ Exceptions, of course, could be created to excise confidential information, like medical information.

Rule Requiring Open Meetings: A rule should require that commission meetings be open to the public. Notice of commission meetings should include the date, time, place of the meeting,⁴⁹ and the agenda for the meeting.⁵⁰ The rule should specify what parts of the meeting are open to the public, and what parts will be closed,⁵¹ and provide a rationale for closing part of the meeting.⁵²

Rule Permitting Public Participation in Open Meetings: A rule should permit members of the public to ask questions regarding the process and to comment on the qualifications of the candidates.⁵³

Rule Requiring Public Notice of Commission Actions: The chair should distribute to the print, radio, and television media notice of all judicial vacancies,⁵⁴ the names of the nominating commissioners, the names of applicants for the judicial positions,⁵⁵ and the names of the nominees selected by the commission for consideration for appointment by the governor.⁵⁶

Rule Requiring Data Collection Regarding Diversity: Each commission should be required by rule to keep records regarding the

47. See, e.g., N.M. RULES GOVERNING JUDICIAL SELECTION COMM'NS, *supra* note 28, § 2(E).

48. See, e.g., *id.* § 2(D).

49. See, e.g., *id.* § 2(C).

50. See, e.g., *id.* § 2(F) (providing that the agenda be sent to commission members).

51. See, e.g., *id.* § 7(A) *et seq.*

52. For example, the rule could permit the deliberation part of the meeting to be conducted in closed session in order to promote candid discussion of the applicants. See, e.g., ALASKA JUDICIAL NOMINATING PROCEDURES, *supra* note 20, § VI(B).

53. See, e.g., ALASKA JUDICIAL NOMINATING PROCEDURES, *supra* note 20, § III(B); N.M. RULES GOVERNING JUDICIAL SELECTION COMM'NS, *supra* note 28, § 5(E).

54. See, e.g., N.M. RULES GOVERNING JUDICIAL SELECTION COMM'NS, *supra* note 28, § 2(A) (providing for "the chair to announce publicly" any such vacancies).

55. See, e.g., *id.* § 2(E).

56. See, e.g., *id.* § 9.

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gender, race, and ethnic status of the commission members, applicants for judicial positions, nominees, and judges appointed by the governor. Connecticut requires by statute the reporting of statistics regarding the race, gender, national origin, and religion of all judicial applicants.⁵⁷ Statistics provide data for measuring the success of the system in achieving diversity.

Rule Requiring Annual Reports: Each commission should be required to issue annual reports on its activities to the governor, the supreme court, the legislature, the state bar association, local bar associations, minority bar associations, and the public. The annual report should include the number of judicial vacancies filled during the year, the courts in which the vacancies were filled, the number of applicants for each vacancy, the number of nominees for each position, and ethnic and gender figures for commission members, applicants, nominees, and appointees. An example of a reporting requirement for judicial nominating commissions appears in the Connecticut judicial selection statute.⁵⁸ It requires the chairperson of the commission to submit a report in January of each year to the joint standing committee on the judiciary. In addition to information regarding the number of candidates interviewed and number recommended, Connecticut requires the report to include “the statistics regarding the race, gender, national origin, religion and years of experience as members of the bar of all such candidates.”⁵⁹

Transparency in the process and in the results will go a long way towards enhancing diversity and ensuring the legitimacy of any judicial selection system. Procedures and practices formalized by rules that enhance transparency offer several advantages. They provide continuity so that changes in personnel will not mean changes in the efforts to ensure diversity. They also permit monitoring of the process by the public and interested groups like women’s and minority bar associations that may bring pressure or lawsuits to compel compliance with the rules.

More important, a transparent process with required reporting of statistics regarding the number of women and minorities on commissions, in the applicant pool, and on the list of nominees provides a basis for measuring how well the appointive system has achieved diversity. Success can be measured in part by the diversity of commissioners, but the real proof is in the number and per-

57. CONN. GEN. STAT. § 51-44a(m)(3) (2006).

58. *Id.* § 51-44a(m).

59. *Id.* § 51-44a(m)(3).

centage of women and minority lawyers nominated for judicial positions and ultimately appointed by the governor.

New Mexico again provides an example of how gender and minority statistics afforded an assessment of the efforts to achieve diversity in an appointive system. The New Mexico experience in the first ten years with an appointive system shows that 27.1 percent of the judges appointed were minorities and 24.7 percent were women.⁶⁰ The percentage of women applicants over this ten year period was 25.1 percent and produced 24.1 percent of the nominees and 24.7 percent of the appointed judges.⁶¹ Minority applicants constituted 26.2 percent of the applicant pool and did even better. This applicant pool produced 33.1 percent of the nominees and 27.1 percent of the appointed judges.⁶² Although these percentages are disproportionate to the population as a whole, they compare favorably with the state bar demographics which show that, in 1997, 19.5 percent of the New Mexico lawyers were minorities and 31.2 percent were women.⁶³ The data cannot, of course, demonstrate that the New Mexico diversity requirement for nominating commissions was the decisive factor that produced the favorable results for women and minorities in the appointive system. Nevertheless, the importance of diverse interests being represented on nominating commissions was recognized by the State Bar of New Mexico's Task Force on Judicial Selection. After reviewing the judicial selection process, the Task Force concluded that the efforts of the various commissions to assure diversity were desirable.⁶⁴

Women and minorities in New Mexico have fared better under the appointive system than they did under the previous electoral system.⁶⁵ The commission nomination and appointment system did not operate to the disadvantage of women and minorities. The data collected in this comparison dispelled the fears raised by opponents of the appointive system that women and minority lawyers would not do as well as they had in the purely electoral system.⁶⁶

60. See Romero, *supra* note 12, at 205.

61. *Id.*

62. *Id.*

63. See STATE BAR OF N.M.'S TASK FORCE ON JUDICIAL SELECTION 3 (submitted Dec. 23, 1997, and accepted and approved by the State Bar Board of Bar Commissioners on Jan. 23, 1998).

64. *Id.*

65. See Romero, *supra* note 12, at 219-20.

66. See *id.* at 220, Table 17.

V. IMPLEMENTATION OF PRACTICES THAT ENHANCE DIVERSITY

In the absence of legislation or rules mandating actions that enhance diversity, a conscientious commission and conscientious chair can implement informal practices that further diversity. The chair and commission can implement all of the recommended actions described above that promote transparency and diversity. No legislation or rule is required to authorize a commission to keep statistics regarding the race, ethnicity, or gender of commissioners, applicants, and nominees. No legislation or rule is required to authorize an annual report including those statistics. No legislation or rule is necessary to authorize dissemination of the names of commissioners, applicants, and nominees to the public, including minority bar associations. A chair and commission interested in promoting diversity would have no constraints on recruiting minority lawyers as commissioners or applicants or in educating the minority bar associations about the process.

VI. CONCLUSION

An appointive system for selecting judges must address the issue of diversity if it is to gain the acceptance of minority communities and the general public. Minority lawyers will not apply for judicial positions if they perceive the process to be secret, closed, and exclusive. An appointive system that produces a non-diverse bench will not have the support of minority communities and the public if it appears that the appointive system of selecting judges excludes qualified minority lawyers. A perception of unfairness in selecting judges will undermine the credibility and legitimacy of the appointive system.

More important, an appointive system that produces a non-diverse judiciary does not serve the needs of the community. The American Bar Association has recognized the necessity of increasing the diversity of the judicial branch.⁶⁷ The number of states that have required consideration of diversity in their appointive systems attests to the importance of a diverse judiciary. Utah's Judicial Council stated that the relevancy of diversity is "to promote a judiciary of sufficient diversity that it can most effectively serve the needs of the community."⁶⁸ Efforts to enhance diversity in appoin-

67. See, *Justice in Jeopardy: Report of the A.B.A. Comm'n on the 21st Century Judiciary*, 2003, at 60, available at www.abanet.org/judind/jeopardy/pdf/report.pdf.

68. UTAH JUDICIAL NOMINATING COMM'NS MANUAL, *supra* note 11, § IX(B)(2).

tive systems and to increase transparency in the appointive process will help achieve the important goal of diversity in our judicial system and increase the effectiveness of the judiciary in serving the needs of our communities.